

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

HONORABLE OTIS D. WRIGHT, JUDGE PRESIDING

UNITED STATES OF AMERICA,)

)

Plaintiff,)

)

vs.)

NO: CR 10-351-ODW

)

)

ARMANDO BARAJAS, et al.,)

)

Defendants.)

)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, September 11, 2012

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1 **LOS ANGELES, CALIFORNIA; TUESDAY, SEPTEMBER 11, 2012;**

2 **10:11 A.M.**

3
4 THE CLERK: Remain seated and come to order.
5 This United States District Court is now in session, the
6 Honorable Otis D. Wright, United States District Judge
7 presiding.

8 Calling Item 1, CR 10-351, United States of
9 America versus Armando Barajas, et al. Also present are
10 Defendants No. 2, No. 7, No. 9, No. 12, No. 26, No. 27,
11 No. 29, No. 32, and No. 45.

12 Counsel, may I have your appearances, please?

13 MS. EL-AMAMY: Good morning, Your Honor. Reema
14 El-Amamy and Michael Dore on behalf of the
15 United States.

16 THE COURT: Good morning, Counsel.

17 MR. WALSH: Good morning, Your Honor. Joseph
18 Walsh appearing with Jessica Medina, who is present in
19 court on bond.

20 MR. DOMNARSKI: Good morning, Your Honor.
21 William Domnarski with Ms. Maria Lopez. There's a
22 waiver of the Defendant's presence on bond.

23 THE COURT: Thank you.

24 MR. CEPHAS: Good morning, Your Honor. Dana
25 Cephas for Raul Prieto, who is on bond, and he's in the

1 first row.

2 MR. NAVARRO: Good morning, Your Honor. Angel
3 Navarro appearing for Carlos Rivera, who is seated to my
4 right.

5 MR. NISHI: Good morning, Your Honor. Thomas
6 Nishi on behalf of Mr. Juan Diaz, who is present in
7 court.

8 MR. MAYOCK: Good morning, Your Honor. Michael
9 Mayock present with Mr. Steven Espinoza, who is present
10 in court.

11 THE COURT: Welcome, sir. I was in another
12 court in the other building and found out I was in the
13 wrong place. I apologize.

14 MR. BAKMAN: Good afternoon, Your Honor. Larry
15 Bakman appearing for Steven Vega, who is present in
16 court.

17 THE COURT: Welcome back.

18 MR. BAKMAN: Thank you, Your Honor. Good to be
19 back.

20 MR. PEREZ: Good morning, Your Honor. Hector
21 Perez appearing for Salvador Gutierrez Martinez, who is
22 present in custody, Your Honor.

23 THE COURT: Good morning.

24 MR. EISNER: Good morning, Your Honor. Alan
25 Eisner representing Juan Gil. He's present in court.

1 MR. HARRIS: Good morning, Your Honor. William
2 Harris on behalf of Armando Barajas. He's present in
3 custody.

4 THE COURT: Good morning to you all. All
5 right. We're going to have to go through this fairly
6 quickly for a number of reasons, and I think I'm going
7 to be encouraged to take a lot of the future motions
8 under submission.

9 With respect to the motion to sever brought by
10 Moreno and Barajas, Docket Nos. 1569 and 1602, as I
11 indicated when we last met, that motion or those motions
12 and the joinders will be granted. All I wanted to was
13 for there to be some consideration given through an
14 intelligent way of grouping the remaining cases. I have
15 received in writing at least the Government's input, but
16 that is all I've received.

17 Does that indicate that there is acquiescence
18 in the Government's grouping.

19 MR. CEPHAS: No, Your Honor.

20 THE COURT: Anyone? All right. Mr. Cephas.

21 MR. CEPHAS: Your Honor, I believe -- well,
22 first of all, we received the Government's proposed.

23 THE COURT: Don't cry. Just give whether or
24 not you've got another grouping.

25 MR. CEPHAS: What I was going to say is I need

1 a little more time to consider the -- their proposal
2 because I just got it yesterday afternoon, and I also
3 would like to see the Superseding Indictment so that I
4 know exactly what's there so that I can accurately
5 assess the proposal, and until I see what's in the
6 Superseding Indictment, I believe it would be difficult
7 for any of us to adequately assess the proposal and --
8 and, again, like I said, we just got it yesterday
9 afternoon. That's all Your Honor.

10 THE COURT: My understanding is that it is
11 going to remove a number of overt acts.

12 MS. EL-AMAMY: That is correct, Your Honor. As
13 the Government indicated, there will be minimal
14 revisions to the Indictment that will remove overt acts,
15 no additional violent crime and overt acts will be
16 included. There will be an additional charge brought
17 against Defendant Rivera related to his possession of a
18 firearm in furtherance of a drug trafficking crime.

19 THE COURT: That's the 924 you referenced?

20 MS. EL-AMAMY: Yes, Your Honor.

21 THE COURT: Okay.

22 MS. EL-AMAMY: The Government may also include
23 additional phone counts, Title 21, United States Code,
24 Section 843(b), but it will look substantially similar.

25 THE COURT: Okay. Mr. Cephas, does that change

1 your position at all?

2 MR. CEPHAS: No, Your Honor. My other, I
3 guess, initial point is I think six people -- my
4 client's in the first proposed grouping of six. I would
5 propose breaking that six up into two separate groups,
6 and the first grouping would be my client, Mr. Rivera,
7 and Jessica Medina.

8 MR. WALSH: And, Your Honor, Joseph Walsh for
9 Jessica Medina, that would be my comment also. I think
10 the divisions proposed by the Government is a little bit
11 heavy on the first trial and light on the second trial,
12 and I think that Mr. Cephas's proposal of severing his
13 client, my client, and Mr. Rivera in a single trial
14 would -- would be an appropriate grouping because all of
15 them are directly related to the investigation
16 surrounding the wiretap of Target Telephone No. 9.

17 THE COURT: All right. So is -- is -- is your
18 concern primarily with the numbers? My concern is
19 primarily with the evidence. I would like to have those
20 who were going to have to defend common evidence be
21 tried together regardless of the numbers.

22 That was a question to you.

23 MR. CEPHAS: And, Your Honor, I believe that
24 the common evidence would be with Medina, Rivera, and
25 Prieto. I think if they try us with those other three,

1 it's just going to result and spillover from those three
2 onto my client, Mr. Rivera, and Ms. Medina that really
3 has no relationship to the allegations in the
4 Indictment. That is why I think that is a fair
5 proposal.

6 THE COURT: Okay.

7 MS. EL-AMAMY: Your Honor, respectfully, the
8 Government disagrees. What I think the Defendants are
9 trying to do is take an extremely narrow view of this
10 case. However, the Defendants' participation in this
11 conspiracy is much broader than what's being portrayed
12 in just a limited -- what they'd like to do is just look
13 at August, 2009. However, Carlos Rivera has been a
14 long-time member of the Black Angles gangs. During a
15 conversation with at least one narcotics trafficker, he
16 threatened him saying "I'm a Black Angels gang member.
17 His co-conspirator better not be informing to law
18 enforcement on me." Defendant Prieto owns or lives at
19 the residence where a firearm transaction took place
20 where Carlos Rivera admits in a telephone conversation
21 that he was getting a firearm for the gang at that
22 location because he was on parole. After
23 Defendant Rivera was arrested, Defendant Medina gets on
24 the phone with one of leaders of the Black Angels gang.
25 Defendant Navarro, then, talks about who might be

1 informing with law enforcement and also talks about the
2 fact that other Black Angels gang members have been
3 arrested. She takes steps to protect the conspiracy as
4 well as to continue the drug trafficking activity. I
5 think in this case limiting it to just these three
6 Defendants doesn't serve necessarily any judicial -- any
7 purpose for judicial economy. The same evidence will be
8 presented at their trial as would be other Black Angel
9 gang members' trials. Additionally, limiting
10 instructions can be taken to cure any spillover effects
11 if there are any, which the Defendants have not shown,
12 and so the Government maintains that at trial with, you
13 know, Defendant Barajas, Defendant Maria Lopez, and
14 Defendant Prieto and Medina and Rivera would be
15 appropriate.

16 MR. CEPHAS: Your Honor, could I simply suggest
17 that the Defendants have a chance, perhaps a week, to
18 meet and prepare a written response?

19 THE COURT: Mr. Cephas, did I not ask you all
20 to do that when we all last met?

21 MR. CEPHAS: Your Honor --

22 THE COURT: Yes, I did.

23 MR. CEPHAS: It was my understanding that the
24 Government was going to give us a proposal that we could
25 respond to.

1 THE COURT: I didn't -- I didn't say anything
2 about that. I told you all to get together and work out
3 something that makes sense before we met today.

4 MR. CEPHAS: And to the extent it was going to
5 be a joint effort, then I would have expected the
6 Government to reach out to the Defendants. That never
7 happened. All we -- we just got a proposal dropped on
8 us, Your Honor.

9 THE COURT: What have you -- what have you all
10 done, the Defendants, separately? Separate and apart
11 from the Government, what have you all done in deciding
12 among yourselves what is an intelligent grouping?

13 MR. CEPHAS: Your Honor, we didn't do anything.

14 THE COURT: Okay. Good. Thank you.

15 Well, anyway, like I said, I'm going to grant
16 the motion. The difficulty that I have, of course, is
17 that I'm not in a position of knowing what evidence is
18 going to be presented. I'm afraid that information
19 resides with the Government. The Government knows how
20 it's going to put on its case. So for now, then, seeing
21 I don't have a really contrary proposal, for now, I'm
22 going to go along with the Government's proposal.

23 All right. Let's move on, then, to -- I'm not
24 sure of the next in any order, but the motion for an
25 order requiring that the Government provide a witness

1 list thirty days before trial. This is -- I guess this
2 is yours Mr. Cephas, Docket No. 1581.

3 Why do you feel that the Government is
4 obligated to provide you with a witness list?

5 MR. CEPHAS: Well, first, Your Honor, the
6 Government did -- has agreed to do that but --

7 THE COURT: Answer my question.

8 MR. CEPHAS: I believe that we are entitled to
9 it in order to adequately prepare because --

10 THE COURT: No, no, no. That means you would
11 like it. I want to know why you feel that you're
12 entitled to have it.

13 MR. CEPHAS: I believe that, if my clients are
14 to have a fair trial, that I have to have a witness list
15 prior to trial. I don't believe --

16 THE COURT: Why don't you give me your
17 recitation to a rule.

18 MR. CEPHAS: I am -- I am relying --

19 THE COURT: Why don't you just simply say there
20 is no rule, there is no requirement that they provide
21 you with a witness list.

22 MR. CEPHAS: Of course, there's not. It's in
23 the --

24 THE COURT: Well, why don't you just say that.

25 MR. CEPHAS: It's in my motion that the Court

1 has discretion to order it.

2 THE COURT: Okay. Now listen. Here's the
3 problem that I have with an earlier order. I would not
4 have issued that order requiring the disclosure of
5 cooperating witnesses. To the extent that the
6 Government has already made disclosures, fine. I'm not
7 requiring that the Government make any further
8 disclosures of any kind, non-expert, non-expert
9 witnesses. Okay. So that motion is denied.

10 MR. EISNER: Your Honor, may I be heard on
11 that?

12 THE COURT: Yes, go ahead, Mr. Eisner.

13 MR. EISNER: I do acknowledge that this was a
14 motion that was initially filed by Mr. Cephas and also
15 by Mr. Solis on behalf of Mr. Barajas.

16 THE COURT: And you didn't file a joinder.

17 MR. EISNER: I believe I did, Your Honor.

18 THE COURT: Who's your client?

19 MR. EISNER: Mr. Gil.

20 THE COURT: Mr. Gil. Yes, you did. 1610.
21 Okay. Go ahead.

22 MR. EISNER: In the Government's reply, the
23 Government agreed to give a witness list, and I think
24 that that acknowledgement -- first of all, it's a
25 appreciated; second of all, it's an acknowledgement of

1 the length and the breadth and the difficulty of
2 defending a case like this. We're talking about fifty
3 different people --

4 THE COURT: Uh-huh.

5 MR. EISNER: -- who, at various times, are
6 pleading out and whose conduct may or may not be part
7 the evidence in the case.

8 THE COURT: Uh-huh.

9 MR. EISNER: We're talking about conduct that
10 spans over a decade or decades. We're talking about
11 violent conduct. We're talking about wiretaps. To have
12 the Defendants go in on day one without some degree
13 of -- of knowing the order of the evidence, really puts
14 them at a handicap because of the unique nature of a
15 RICO case. Again, we're talking about months or years
16 of wiretaps, and -- and there are so many moving
17 parties. I just --

18 THE COURT: How do you -- that was raised --
19 maybe it was raised in your papers. You wanted really
20 to know the order of the evidence, and I'm wondering how
21 are you going to get that unless the Government decides
22 to give you its playbook.

23 MR. EISNER: I'm not asking for a playbook,
24 Your Honor. I'm asking for a witness list, which the
25 Government has already agreed to provide thirty days in

1 advance of trial.

2 THE COURT: Okay. Why aren't you happy with
3 that? Why aren't you happy with whatever the Government
4 gives you?

5 MR. EISNER: Well, I think there are due
6 process concerns in a case like this that require some
7 orderly disclosure of what the anticipated evidence will
8 be.

9 THE COURT: Uh-huh.

10 MR. EISNER: These are -- I asked that
11 Your Honor acknowledge these are unique cases. It's not
12 every day that you sit in a court among what starts out
13 as fifty but dwindles down to thirteen or so Defendants
14 over the course of two years.

15 Another reason, Your Honor, is because, as you
16 can see from some of our other motions, within the last
17 thirty days -- thirty to forty days, there has been over
18 a thousand pages of new, brand new material provided to
19 the Defendants. When is that going to come in? In the
20 beginning or the end? So I don't want to belabor the
21 point, Your Honor, just to emphasize the Government's
22 already agreed to give a witness list thirty days before
23 trial. They didn't address the exhibit list issue.
24 I've put in my reply the reasons why an exhibit list, I
25 think, is fair and appropriate. The Government is

1 silent on that.

2 THE COURT: No, I do want to talk about that.

3 Ms. El-Amamy, what's wrong with the Government,
4 perhaps, even on a rolling basis, continuing to update
5 it's exhibit list? I understand that, up until the
6 night before trial, that thing may still be modified,
7 but what's wrong with, as you modify it, perhaps, making
8 it available to Defense Counsel?

9 MS. EL-AMAMY: Well, Your Honor, typically I
10 don't think that I would have an issue with it.
11 However, the posture of this case has put the Government
12 in a difficult situation. There have been -- the
13 Government's made its best effort to disclose things
14 early, and when it fails to disclose some of those,
15 what's represented not just to the Court but to
16 Government counsel personally in a barrage of e-mails is
17 overwhelming.

18 THE COURT: I can imagine, and I need to make
19 it clear -- well, what seems to be happening is the
20 Government is being criticized and basically persecuted
21 for making evidence available, and they continue to make
22 evidence available on an ongoing and rolling basis. I
23 would think that that would be a good thing, but what
24 the Government, then, is being criticized for is now
25 you've got to look at this evidence and maybe alter

1 your -- your strategy somewhat. I would think that
2 continuing to make things available as it becomes known
3 to the Government is something that you would desire.
4 So I can understand counsel becoming somewhat frustrated
5 and, perhaps, even take the Government personally when
6 you're called into Court to defend these things, and
7 literally the basis for some of these motions is that so
8 much material seems to be produced. I think it's a good
9 thing that the material continues to be produced. So
10 don't use that as an argument in the future. All right.

11 All right. Ms. El-Amamy, I'm going to ask you
12 to at least every couple of weeks would you please
13 update your exhibit list. I understand you'll be adding
14 things. You may be removing things, but I think it's --
15 it's only -- well, I would appreciate if you would do
16 it.

17 MS. EL-AMAMY: Yes, Your Honor.

18 THE COURT: All right.

19 MR. CEPHAS: Your Honor, could I ask for a
20 clarification?

21 THE COURT: Yes, and I was about to do that
22 now. With respect to the witnesses, I am not making an
23 order that the Government produce or identify any
24 additional non-expert witnesses that it has not already
25 identified. I am frankly concerned about witness

1 safety.

2 With respect to the request for the exhibit
3 list -- you've heard the order -- I'm asking that every
4 couple of weeks that the Government provide Defense
5 Counsel any changes made to the exhibit list.

6 With respect to the motion for discovery of
7 information regarding the legal drug allegations and
8 gang membership --

9 MR. EISNER: I'm sorry, Your Honor. Can I ask
10 for a clarification on behalf of Mr. Gil. You said the
11 non-cooperating witnesses.

12 THE COURT: No, non-expert.

13 MR. EISNER: All right. Are we entitled to a
14 list of any -- I'm sorry, Your Honor. Which witnesses
15 are we entitled to be disclosed of thirty days before
16 trial?

17 THE COURT: Entitled to?

18 MR. EISNER: Well --

19 THE COURT: Okay. The Government -- let me do
20 it again. The Government has already identified and
21 disclosed to you a number of witnesses. I don't think
22 the Government was required to do that, and I'm not
23 ordering that the Government make any further disclosure
24 of non-expert witnesses because I have two concerns,
25 they're not legally required to do it and I'm also

1 concerned by the safety of these witnesses. Okay. Is
2 that clear?

3 MR. EISNER: Right. I understand the safety
4 issue with respect to cooperators, but are you also not
5 having them provide a list of law enforcement officers,
6 let's say?

7 THE COURT: Okay. Let me put it again. Other
8 than witnesses already identified by the Government, I'm
9 not ordering that the Government disclose any additional
10 non-expert witnesses, period.

11 MR. EISNER: Thank you.

12 THE COURT: Okay.

13 MR. BAKMAN: Your Honor, if I might. Before we
14 leave that, the only --

15 THE COURT: We have left that, Mr. Bakman.

16 MR. BAKMAN: I'm sorry, Your Honor.

17 THE COURT: We have left that.

18 MR. BAKMAN: All right.

19 THE COURT: All right. All right. This is
20 Mr. Prieto's motion, Docket No. 1582. This is with
21 respect to illegal drug allegations and gang membership.
22 The Government has already indicated that there is no
23 intention to introduce any 404(b) evidence. So this
24 motion has been rendered moot, and on that basis, it's
25 denied.

1 MR. CEPHAS: Your Honor.

2 THE COURT: Yeah.

3 MR. CEPHAS: It seems to me that the Government
4 has not indicated that it will not admit evidence
5 related to this vague allegation that my client was --
6 was storing drugs. Could I at least ask the Government
7 to clarify that that's not coming in?

8 THE COURT: The clarification I got from the
9 Government, or the explanation I got from the
10 Government, this isn't going to be used for 404(b)
11 purposes but to establish elements of the offense.

12 MR. CEPHAS: Well, Your Honor, the problem I
13 have with preparing a defense for this is they've still
14 not provided me any discovery. I don't know -- I don't
15 know what types of drugs, when. I don't know where this
16 drug -- this alleged drug happened. They won't identify
17 the alleged informant who, perhaps, had -- it's not in
18 the Indictment. So it's a very difficult -- well, it's
19 impossible for me to prepare unless I get something else
20 if the Court is saying they have carte blanche to bring
21 it in as it's inextricably intertwined, and that's why I
22 don't understand. If they can bring it in, then I need
23 to have some advance notice of it if I'm going to have a
24 fair trial. That's -- that's my problem, and right now,
25 I have no advance notice of it other than a vague

1 statement of some drug at some time, and that's just not
2 enough.

3 THE COURT: That's a different motion.

4 MR. CEPHAS: Well --

5 THE COURT: Well, bring that motion.

6 MR. CEPHAS: I brought that motion, Your Honor.

7 THE COURT: All right.

8 MR. CEPHAS: And the Government responded in
9 one of their response. And a footnote -- they footnoted
10 the vague response. The cooperating witness did not say
11 kilogram, and the Government recalls conveying
12 information that it was a large quantity, not a
13 kilogram. That doesn't tell me anything. I don't know
14 what they're referring to. I don't know when. I don't
15 know if this is a year ago, five years ago, ten years
16 ago. I don't know anything about this.

17 THE COURT: Have you sent the Government an
18 e-mail asking for clarification on that point?

19 MR. CEPHAS: Yes, Your Honor.

20 THE COURT: Okay. Try it again. Yes.

21 MS. EL-AMAMY: Your Honor, that -- that
22 information comes from a cooperating witness. As in the
23 Government's paper, Defendant Prieto was provided an
24 opportunity to have discovery related to that over a
25 year ago. He didn't show up at the reverse proffer

1 neither did his counsel.

2 THE COURT: Okay.

3 MS. EL-AMAMY: So it's a cooperating witness,
4 which the Court's order is not discoverable.

5 THE COURT: All right.

6 MR. CEPHAS: And, Your Honor, to be accurate, I
7 told her my client wasn't coming. I would show up for
8 the reverse proffer, and she said there was no point in
9 it because it was for him.

10 THE COURT: Okay.

11 MR. CEPHAS: I was there for the discovery.
12 She did not want to give it to me. So to say that
13 they've been offering it, that's not true.

14 THE COURT: This is not for your benefit. It's
15 for your client's benefit. If your client's not
16 interested, your client's not interested.

17 Okay. Let's move on.

18 So 1582 is denied.

19 Next, the motion to preclude the Government's
20 use of evidence produced after April 30th of 2012. This
21 is also yours, sir. This is Docket No. 1632. What
22 troubles me about this one is the failure to initiating
23 a meet and confer to attempt to resolve this -- this
24 discovery issue without the need for judicial
25 intervention.

1 MR. CEPHAS: And, Your Honor, I e-mailed
2 Ms. El-Amamy all the time. When she wants to responds,
3 she responds. When she doesn't, she doesn't respond. I
4 e-mailed her. She didn't respond. I filed the motion
5 as I indicated.

6 THE COURT: You did. You did. I understand.
7 I read it. You sent her an e-mail 7:00 P.M., and I
8 guess you didn't get a response after 7:00 P.M., and the
9 next morning you filed a motion. Right. Okay. I don't
10 consider that a good faith attempt to meet and confer in
11 an effort to resolve the motion without bringing it to
12 court. On that basis alone, your motion is denied.

13 Lastly --

14 MR. EISNER: Excuse me, Your Honor. I did join
15 in that, and I did want to be heard.

16 THE COURT: Yes, you did, you joined in it, and
17 so you ride that, and you're subjected to that unless
18 you can tell me that you had a separate meet and confer
19 with the Government on this. Did you? Did you? Yes or
20 no?

21 MR. EISNER: I did not, Your Honor.

22 THE COURT: All right. Then you counted on
23 Mr. Cephas to do that. You just simply joined his
24 motion. He didn't do what was necessary in order to
25 really bring that thing to the Court's attention. You

1 don't send something, a letter or an e-mail at
2 7:00 P.M., not get a response, and then file your motion
3 the next morning.

4 MR. EISNER: Can I clarify, Your Honor.
5 Perhaps, it's my mistake. I thought that you were
6 addressing the preclusion of evidence that was tendered
7 after the April 30th date.

8 THE COURT: That's right. The entire motion.

9 MR. EISNER: All right. I -- I -- that
10 April 30th date occurred months ago, and our motion --
11 or Mr. Cephas's motion and my joinder is to hopefully
12 respectfully call Your Honor's attention to the length
13 and the breadth of discovery that we've seen since
14 April 30th and --

15 THE COURT: Didn't I just finish telling you
16 that I think it's a good thing that the Government
17 continues to unearth documents and provide you with that
18 discovery?

19 MR. EISNER: Not if it violates the previous
20 Court's order about that discovery.

21 THE COURT: No. I think there's a bigger
22 violation when the Government fails to produce and to
23 turn over to Defense Counsel relevant, perhaps,
24 exculpatory evidence. I think that's a bigger crime
25 than worrying whether or not it violates Judge Yuen's

1 order. Okay. All right. Listen. I've ruled. Let's
2 move on. I've got a lot of things to do this morning.

3 MR. HARRIS: Your Honor, just briefly, may I be
4 heard on 1632.

5 THE COURT: Yes.

6 MR. HARRIS: I would ask the Court, in light of
7 your ruling, that this be denied without prejudice so
8 that we can do the meet and confer.

9 THE COURT: Yes, done.

10 MR. HARRIS: Thank you.

11 THE COURT: Done. Denied without prejudice.

12 All right. Let's go to the motion to suppress
13 the wiretap evidence from Target Telephone No. 9.

14 MR. WALSH: Yes, Your Honor. Joseph Walsh for
15 Jessica Medina, and I was going to reserve part of my
16 time for Mr. Cephas to argue also since he joined in it
17 and he has provided the Court with some extensive
18 briefing on the subject.

19 THE COURT: One second. This is Docket
20 No. 1590. Okay.

21 Go ahead, sir. My understanding now is that
22 the real thrust is, well, lack of necessity, and I
23 believe you also raised the argument that one of the
24 individuals named did not appear on the DOJ
25 authorization letter.

1 MR. WALSH: Yes, Your Honor. I'll submit that
2 second argument and focus just on the necessity. I
3 think that the necessity issue is the main issue on the
4 wiretap.

5 THE COURT: You understand, when I read these
6 things, then the balance of your argument is -- is
7 shaded by everything you've said, and I'm thinking to
8 myself, if you would raise that kind of frivolous
9 argument, then what's the rest of this? But go ahead.

10 MR. WALSH: Well, I didn't think it was a
11 frivolous argument, Your Honor.

12 THE COURT: Really. This is a wiretap.
13 Authorization is for what? Locations, for -- for tele
14 communications, for facilities, and your objection is
15 that this individual's name was -- it's not even your
16 client -- that this individual's name wasn't mentioned
17 and the authorization letter from the Department of
18 Justice.

19 Okay. Go ahead.

20 MR. WALSH: All right. Well, I'll proceed,
21 then, to the necessity issue because I think that's the
22 stronger argument.

23 THE COURT: Yes, it is.

24 MR. WALSH: And the main argument in the motion
25 and the basis of the argument that I think the

1 Government has overlooked in their response is that this
2 is a spin-off wiretap on Telephone No. 9 based upon an
3 earlier investigation of David Navarro in Target
4 Telephone No. 5.

5 THE COURT: Okay.

6 MR. WALSH: And to obtain a wiretap on a
7 spin-off, they have to conduct a necessity investigation
8 directed to the person who's using the spin-off
9 telephone. In this case it would have been Carlos
10 Rivera, and my client has standing in this motion
11 because, once Target Telephone No. 9 was wiretapped, my
12 client was overheard and intercepted on the telephone.

13 THE COURT: And we do have your client's signed
14 Declaration at best.

15 MR. WALSH: Yes. And necessity requires that
16 other investigative procedures have been tried and
17 failed or appear to be unlikely to succeed if tried or
18 to be too dangerous, and then the Ninth Circuit case in
19 United States vs. Gonzalez, Inc., makes two very
20 important points, and that is that each application for
21 a new phone, a spin-off phone, must have the necessity
22 requirement established as to that suspect and that
23 phone, and the Government -- and the second principle is
24 that the Government cannot transfer the necessity from
25 one application to another even -- even though this is

1 the same investigation, and in this case, the wiretap
2 application for Target Telephone No. 9, which was the
3 Carlos Rivera, has too little information to establish
4 necessity for that telephone. Essentially, what I
5 argued in my papers was that the agents conducted one
6 day of surveillance and examined three days of telephone
7 records, but in reviewing the application, it doesn't
8 even appear that the one day of surveillance was even
9 targeted towards Carlos Rivera. This was a surveillance
10 that was conducted of David Navarro, who was the person
11 on Target Telephone No. 5, and it through that one day
12 of surveillance of David Navarro that they saw a second
13 suspect, and they later identified him as Carlos Rivera.
14 So I may have conceded too much that there was a
15 necessity investigation surveilling Carlos Rivera
16 because that wasn't the purpose of the investigation.
17 He just happened to be there as a happenstance during
18 the course of their targeting David Navarro for
19 surveillance on that day, and then once they identified
20 Carlos Rivera as the person that they -- they saw
21 talking to David Navarro, then they examined three weeks
22 of toll records on his telephone, Target Telephone No.
23 9, and that's not really three weeks worth of a
24 necessity investigation. It's really an investigation
25 that took, perhaps, maybe one hour. They examined the

1 records, and they -- and they looked at who he was
2 calling and who was calling him over a three-day -- over
3 a three-week period, and that was the end of it. And
4 then from the e-mail exchange of the -- between the
5 Government Counsel and Mr. Cephas, it turns out that the
6 actual date on which the wiretap application for Target
7 Telephone No. 9 was submitted by the Government in its
8 99 percent finished form to the Department of Justice in
9 order to get the DOJ authorization that was done on
10 July 8th, which was only five days after they identified
11 Carlos Rivera from this -- from this happenstance and
12 locating him talking to David Navarro on the one day of
13 surveillance, and it was only one day after they had
14 examined his telephone records for a three-week period
15 to see who -- who was -- who Carlos Rivera was calling
16 and who was calling him. And so -- and then so that's
17 clearly insufficient based upon the case law of the
18 Ninth Circuit, and then added to that is in the
19 application, we not only have a lack of any traditional
20 investigation conducted towards Carlos Rivera, but we
21 have in one of the areas of the wiretap application
22 where they're trying to explain that further
23 investigations could not be conducted in this case
24 concerning trash searches, the agent falsely states that
25 he could not conduct a trash search of the user of

1 Target Telephone No. 9 because law enforcement doesn't
2 know his residence. Now, in the Government's response,
3 they -- they admit that that's a false statement from
4 what the affiant states this his Declaration, that he
5 failed to update it, and I pointed out in the reply that
6 a failure to update a wiretap application is the same
7 thing as saying that it was a cut and paste of a prior
8 application to put in the application for the spin-off
9 wiretap, and that's the type of conduct that was
10 criticized by the Ninth Circuit in United States vs.
11 Blackman. They said that, when you cut and paste
12 earlier wiretap applications on the issue of necessity
13 and then you incorporate them on the subsequent
14 application, it leads to the inclusion of misstatements
15 and false statements and material omissions, which is
16 what has occurred in this case.

17 And so, essentially, the cases that we're
18 relying on is United States vs. Gonzalez, Inc., and
19 that's the case of the wiretap investigation where there
20 was six months of a traditional investigation of a bus
21 company in -- in the state of Arizona, and then they got
22 a wiretap on the offices in two cities in Arizona of
23 this bus company, and during the course of this wiretap
24 investigation, they learned that there was further
25 investigation needed to be done of the owner of the

1 company who had an office in Los Angeles. And the
2 Ninth Circuit held that, just conducting a very brief
3 investigation -- let's see. I think -- the
4 Ninth Circuit said that the -- the wiretap tradition --
5 or the traditional investigation conducted at the
6 Los Angeles office consisted of collecting five days of
7 pen registers on the office, five days of trap and
8 trace. In other words, they were just analyzing who
9 this person was calling over a five-day period, and
10 there was limited surveillance. The Court wasn't clear
11 as to how many days, but the impression was it was one
12 or two days of surveillance of the Los Angeles office,
13 and then there was a preliminary discussion of whether
14 there was a possibility of introducing an undercover
15 agent, which they decided not to do, and the
16 Ninth Circuit clearly held that, as a matter of law on
17 those facts, that this was an insufficient traditional
18 investigation, and so necessity was not shown as a
19 matter of law to allow for the wiretap on the offices in
20 Los Angeles, and I think this case falls clearly within
21 Gonzalez, and it also falls clearly within the holding
22 of United States vs. Carneiro, and in the Carneiro case,
23 it was a similar situation involving a drug conspiracy,
24 and the original investigation was towards a suspect by
25 the name of McNeil, and before obtaining a wiretap on

1 McNeil, they conducted their normal traditional
2 investigation of McNeil. They obtained the wiretap, and
3 then during the course of listening into the wiretap of
4 Mr. McNeil, they overheard two additional suspects,
5 Mr. Hardy and Mr. Boyd, but did not conduct further
6 traditional investigations of Hardy and Boyd before
7 obtaining a wiretap order for -- for those two
8 individuals, and the Ninth Circuit held that the
9 wiretaps on Hardy and Boyd, that the spin-off wiretap
10 applications were in violation of Title 3 because there
11 was in traditional investigation conducted of Hardy and
12 Boyd, and the Court held there must be a showing of
13 necessity with respect to each telephone and
14 conspirator, and there wasn't. That wasn't done in
15 Carneiro, and the Ninth Circuit suppressed the evidence,
16 and I think what these cases basically show or hold is
17 that they have ordered suppression of wiretap evidence
18 in cases of spin-off wiretaps where the Government fails
19 traditional investigation of the person using the
20 spin-off telephone, and I think, under the facts of this
21 case, we not only have the insufficiency of the agents
22 doing -- doing nothing more, once identifying Carlos
23 Rivera, other than reviewing three weeks of his
24 telephone records, and -- and then immediately
25 thereafter, one day later, applying for a wiretap. And

1 in the course of applying for that wiretap, they make
2 this false representation within the necessity
3 application concerning trash searches where they falsely
4 represent, well, we can't do a trash search of the user
5 of Target Telephone No. 9 because we don't know his --
6 his address. And, in fact, the --

7 THE COURT: I have a question. Tell me about
8 the trash search. Do you have any estimate of how
9 valuable a trash search would be in this type of case?

10 MR. WALSH: Well, every case is different.

11 THE COURT: This kind of case.

12 MR. WALSH: Well, sometimes you're able to
13 locate co-conspirators, you're able to locate drug
14 pay-and-owes that have been discarded, you're able to
15 locate packing material from drugs when the drugs are
16 taken out of the packing material and thrown out.
17 There's a possibility of locating the names and
18 addresses of co-conspirators that may have been on -- on
19 notation papers and thrown into the trash, but that --
20 but the point of our argument is that the wiretap
21 application in good faith has to truthfully set forth
22 the reasons in the -- in the four corners of the
23 application as to why trash searches would not be useful
24 in this particular case, and they didn't do that here.
25 What they did was they give a paragraph that was

1 completely false as to the reason they can't conduct a
2 trash search, and the inclusion of that false statement,
3 I think, taints -- taints the warrant and puts it on a
4 different class of case than merely reviewing the
5 decision to grant or deny a wiretap under an abuse of
6 discretion standard. When you have the inclusion of a
7 false statement, then the -- the Court has to basically
8 use de novo review and grant the motion to suppress if
9 it's possible that the motion would have been denied by
10 the -- by the magistrate if the -- if the false
11 statement didn't appear in the -- in the warrant
12 application, but we're not relying entirely on that.
13 We're relying mainly on the language in United States
14 vs. Gonzalez, Inc., where they -- they reviewed five
15 days of trap and trace, a couple of days of
16 surveillance, and merely discussing the possibility of
17 having an undercover agent as being insufficient
18 traditional investigation as a matter of law, and I
19 think that the amount of traditional investigation
20 concerning Target Telephone No. 9 and Carlos Rivera in
21 this case is even less than in the Gonzalez, Inc. case
22 and would require the Court to grant the motion to
23 suppress the evidence.

24 THE COURT: Okay. All right. Thank you,
25 Counsel.

1 MR. WALSH: And I think Mr. Cephas wanted to
2 make a brief argument.

3 THE COURT: Mr. Cephas, quickly please.

4 MR. CEPHAS: Thank you, Your Honor. First,
5 with respect to the DOJ authorization, although the
6 Court has indicated it's a frivolous argument, I don't
7 believe it is, and the reason I don't believe it is is
8 because 18, U.S.C., 25-18-1 says that each application
9 for an order authorizing or approving the interception
10 of a wire shall -- shall include the following
11 information: The identity the person if known
12 committing the offense and who's communications are to
13 be intercepted. Here, they --

14 THE COURT: Which application? We're not
15 talking about the application. We're talking about the
16 DOJ authorization letter.

17 MR. CEPHAS: That is right, Your Honor. And
18 the cases and interpreting it have all concluded that
19 the DOJ authorization letter is part of the application,
20 and cases have also said that, if the DOJ did not
21 authorize an individual, then the application fails.
22 This is a case where the evidence suggests the DOJ had
23 no notice. The Government has had an opportunity to
24 prove, otherwise, that the Government -- that the DOJ
25 had notice. There is none. Nothing was presented to

1 the reviewing judge showing that DOJ was ever told that
2 they knew the phone was going to be used -- was used by
3 Carlos Rivera; therefore, the application should never
4 have been authorized with respect to Rivera.

5 Moving on to the necessity, 25-18,
6 Subsection C, states that, in order to show necessity,
7 there has to be a full and complete statement as to
8 whether or not investigative procedures have been tried
9 and failed or why they reasonably appear to be unlikely
10 to succeed if tried or to be too dangerous. The
11 Government cited those three prongs in their opposition;
12 one, have been tried and failed; two, reasonable
13 appeared to be unlikely to succeed if tried; or, three,
14 were too dangerous to attempt, and they cited Gonzalez
15 for that. Nowhere in the application do they say it's
16 too dangerous. Nowhere in the application do they
17 demonstrate that they tried and failed, and nowhere in
18 the affidavit or application have they pointed out that
19 these traditional methods would be reasonably unlikely
20 to succeed if tried. All that the agents said over and
21 over again is, well, we've had some success at this.
22 We've had some success at that. We've had some success
23 at the other things, but it would be so much better if
24 we had a wiretap. So what they were doing was,
25 actually, successful, but they were given a wiretap

1 based on the claim that it would be even better if we
2 had a wiretap. Well, that goes without saying in any
3 case. Their -- their affidavit -- and even their
4 opposition fails to demonstrate any of those three
5 prongs, and for that reason, the wiretap should have
6 never been granted and it should be suppressed.

7 Thank you, Your Honor.

8 THE COURT: Thank you, sir.

9 Ms. El-Amamy.

10 MS. EL-AMAMY: Yes, Your Honor, starting first
11 with necessity, I think the Defendants' argument needs
12 to be examined first from a factual basis. What they
13 would like the Court to believe is the Government's
14 investigation of Carlos Rivera began on a date that he
15 was identified. However, in the affidavit, at
16 USA 000593, at least by May 16th, 2009, although Carlos
17 Rivera was not identified, he was identified as a person
18 who was relevant to the investigation. The first of his
19 calls listed in the affidavit was May 16th, 2009, then
20 May 26th 2009, June 26th, 2009, and then a call on
21 July 8th, 2009. Prior to July 3rd, 2009, he was not
22 identified by the affiant. However, the affidavit lists
23 surveillances that took place on June 23rd, 2009,
24 targeting the gang; June 24th, 2009, targeting the gang;
25 and again June 25th, 2009, targeting the gang. The

1 prior affidavit, which is incorporates by reference at
2 USA 000450, also lists a surveillance on May 24th, 2009,
3 which targets the gang. So it's not accurate to say
4 that we just learned of Carlos Rivera on July 3rd, 2009,
5 and submitted his affidavit to the -- to DOJ. That's
6 not what happened in this case, and that's what the
7 Defendants are basing their argument on.

8 Now, even with all these instances of
9 surveillance, law enforcement were not able to identify
10 Carlos Rivera until July 3rd, 2009. What the Defendants
11 are arguing is that somehow there was some investigative
12 technique, and they've conceded that there were no
13 confidential sources, there were no witnesses who were
14 prepared to testify before the Grand Jury. They failed
15 to acknowledge that the Government did conduct a check
16 to see if there were any jail calls to Target
17 Telephone 9 prior to submitting the affidavit. That
18 didn't assist in the investigation. Surveillance
19 activities, while, perhaps, after he was identified,
20 would have tracked this Defendant, it does not indicate
21 how it would identify his co-conspirators, including
22 Defendant Medina and Defendant Prieto, who were not
23 identified as being co-conspirators until after the
24 phone was being intercepted.

25 What they're claiming is that in this case a

1 trash search, a pen register, and GPS and a parole
2 search would have been useful in assisting in the
3 investigation. In this affidavit, as well as in the
4 previous affidavits which are incorporated by reference,
5 the affiant set out a trash search would not be
6 useful -- would likely not be useful to the
7 investigation. That's in the four corners of the
8 affidavit. A parole search at some unidentified time
9 who, perhaps, Carlos Rivera, would have had materials at
10 his home. Perhaps, he wouldn't at that date and time.
11 It, certainly, wouldn't help law enforcement officers
12 identify his source of supply or Defendant Medina
13 Defendant Prieto's role in the conspiracy.

14 GPS, again, would be useful, perhaps, in
15 assisting law enforcement officers to learn about where
16 Carlos Rivera was located at a particular time.
17 However, we wouldn't be able to know what he was doing
18 at a particular time, whether or not that meeting was
19 useful to send law enforcement resources there; and,
20 again, law enforcement officers would not be able to
21 learn about the co-conspirators' role including
22 defendant Medina and Defendant Rivera.

23 Now, the Defendants argue, too, that the
24 Government's made no showing that it was too dangerous
25 to employ law enforcement resources. However, the very

1 nature of the calls that are listed in the affidavit
2 display on its face why it's dangerous to conduct law
3 enforcement activities. For example, in one call, this
4 Defendant and his co-conspirator are discussing getting
5 a gun. In another call, they're discussing in quotes
6 "fucking with law enforcement," who is behind Carlos
7 Rivera. In another call, Carlos Rivera is talking about
8 getting at an individual, a female individual who owes
9 money to a co-conspirator. The very nature of the
10 Government's affidavit demonstrates dangerousness.

11 It's also just simply not true --
12 Defendant Prieto has argued that the Government
13 somehow -- the Department of Justice was not aware that
14 Carlos Rivera was the user of the phone. The
15 application, affidavit, and proposed order were all
16 submitted to the Department of Justice. All those
17 clearly state that Defendant Carlos Rivera was a primary
18 user of the telephone. It just makes no sense that now
19 the Department of Justice wouldn't be aware of who the
20 primary user of the telephone is.

21 This is not a spin-off wiretap application.
22 The Defendants would like to tie this to Blackman, which
23 was essentially related to a different investigation,
24 and the Government took great lengths in its opposition
25 to distinguish Blackman from this under case.

1 Although the Defendants throw out various
2 investigative techniques, none of them and the
3 Government submits it isn't aware either how those
4 investigative techniques would have furthered the goals
5 of the investigation, which is not just targeted to
6 Carlos Rivera as the Defendants would like the Court to
7 believe but was targeted to him and members of his
8 conspiracy.

9 THE COURT: I know. I -- actually, I think
10 Blackman probably helps you for reasons that are
11 irrelevant. I'm familiar with the Jordon Downs Housing
12 Project. I cannot imagine police conducting some sort
13 of covert investigation in there. I think a great deal
14 of deference or at least some deference needs to be
15 accorded to law enforcement when they make an assessment
16 as to what will or will not probably work or what will
17 or will not probably be very dangerous.

18 Yes, Mr. Cephas.

19 MR. CEPHAS: Your Honor, there has to be some
20 deference to law enforcement when they say something,
21 but they didn't say anything here. They didn't say
22 surveillance wouldn't work. In fact, as I pointed out,
23 they surveilled Navarro, and that's how they found out
24 who Rivera was by surveilling Navarro. Ms. El-Amamy
25 claimed surveillance wouldn't have done anything. Well,

1 if they had surveilled Rivera, he would have -- he would
2 have shown them Mr. Prieto because he goes to Prieto's
3 house a lot, and they know that, and so surveillance
4 would have worked. Surveillance of Mr. Rivera would
5 have revealed his girlfriend, Jessica Medina, because
6 she's his girlfriend. So to say that surveillance
7 wouldn't have led to co-conspirators is just flat wrong
8 and disproven by the evidence, and it's another one of
9 the conclusory statements that has no case-specific
10 facts.

11 THE COURT: All right. Mr. Cephas, I'm going
12 to -- what I'm going to do is go back and read it again
13 based on your representation that it's just not there.
14 Okay.

15 MR. WALSH: Your Honor.

16 THE COURT: Even considering the fact that some
17 of your earlier representations to the Court have not
18 been totally accurate.

19 MR. CEPHAS: Well, Your Honor --

20 THE COURT: Why don't you just sit down.

21 Yes, sir.

22 MR. WALSH: May I make a brief response? Much
23 of the references that the Government was making to the
24 wiretap applications strike me as gathering information
25 on the issue of probable cause, and I think the Court

1 has to make a distinction between the necessity
2 investigation and investigation developing probable
3 cause because you can gather a lot of probable cause in
4 listening to the earlier wiretap Target Telephone No. 5,
5 and you can hear Mr. Rivera calling and making
6 conversations, drug-related conversations over the
7 telephone, but that's not a necessity investigation.

8 THE COURT: I understand that, and I want to
9 take a look at -- at the affidavit with an eye towards
10 whether or not it's established all of those prongs that
11 are required. So I want to take a look at that. Okay.

12 MR. WALSH: And you're focusing only on the
13 necessity.

14 THE COURT: On necessity only. Okay. All
15 right.

16 You're on your feet.

17 MR. CEPHAS: Your Honor, I thought we were done
18 with this --

19 THE COURT: We are.

20 MR. CEPHAS: -- and I wanted to raise a
21 separate issue.

22 THE COURT: Okay. We are done.

23 MR. CEPHAS: Thank you. The issue is related
24 to expert witnesses, and it -- it's sort of part of what
25 was addressed in the motion to preclude, but it was --

1 it was raised anew by the status conference report that
2 we received yesterday, and then last night, I received
3 expert notice of a new government expert.

4 THE COURT: Okay. What's -- what's your
5 concern because you have to understand that this is
6 inevitable? If you make someone disclose your witnesses
7 a year in advance, there's going to be changes. You
8 understand that?

9 MR. CEPHAS: I understand that, Your Honor, and
10 I also understand that, when you give me an order or the
11 Court gives me an order, I'm going to assume I have to
12 follow it.

13 THE COURT: I read all of that. Don't do it
14 again. Okay.

15 MR. CEPHAS: Well, Your Honor --

16 THE COURT: You're going to do it, aren't you?

17 MR. CEPHAS: No, I'm not. I'm not.

18 THE COURT: I read your papers.

19 MR. CEPHAS: Okay. What I'm going to address
20 is what happened last night, an exchange last night
21 where -- and what you didn't read in my papers hasn't
22 been presented because I didn't know they were going
23 to -- they were going to present an expert witness in
24 their status conference report and then in the notice
25 last night. Two weeks ago, we got an e-mail saying

1 that, because they're past the expert deadline
2 destination, they were going to move ex parte to seek
3 the Court's permission to designate an expert. I then
4 sent an e-mail back saying that I didn't believe an
5 ex parte was justified. Please do it by noticed motion.
6 I got no response. Then the status conference report
7 yesterday was filed saying we intend to designate
8 another expert.

9 THE COURT: Is this the gang expert?

10 MR. CEPHAS: No this is a drug expert.

11 THE COURT: Drug expert. Okay.

12 MR. CEPHAS: And the problem that happened with
13 the gang expert is the gang expert was designated on
14 time, February 9th, I believe was the date, but there
15 was no meat to it. There were no opinions. There's
16 were no bases for the opinions. There were none of the
17 facts that were required. And over the next four
18 months, we spent thousands and thousands of dollars of
19 CJA money trying to get the Government to flesh out
20 information on -- on the expert, to try to get the
21 opinions, we never did, and then finally on June 15th,
22 the Government said never mind. So yesterday, we got an
23 expert designation, same thing, even though we have been
24 through all this before, it's got no -- it's got no
25 opinions. It just lists topics. It's not an expert

1 designation. We're now going to have to go through the
2 same fight and spend thousands more dollars of CJA money
3 because they didn't designate an expert on time, a drug
4 expert who works for the Government who could have been
5 designated at any time, and instead now we're going to
6 have to start this fight all over again. And it should
7 have been done by noticed motion so that we could have
8 responded to it, and instead the Government sends me an
9 e-mail last night saying, well, if you intend to
10 challenge this, let me know if you're going to do it by
11 ex parte or noticed motion because they don't have to
12 file the Court's -- follow the Court's rules apparently,
13 and I do, and I don't think it's appropriate. I think
14 that they should not be allowed to designate a drug
15 expert at this time and, especially, in light of the way
16 they failed to designate properly months ago, costing us
17 thousands of dollars unnecessarily.

18 THE COURT: What are you asking for?

19 MR. CEPHAS: Well, my --

20 THE COURT: Since we're talking about following
21 the rules, what are you asking for because I don't have
22 any paper in front of me?

23 MR. CEPHAS: Well, you have the Government's
24 status report --

25 THE COURT: Yes, I do.

1 MR. CEPHAS: -- which indicates that they are
2 going to designate an expert. I would like the Court to
3 rule that they cannot designate any more experts.
4 There's no basis for a designation at this point. It
5 was the relief that I requested in the motion that you
6 earlier denied, but you denied it on -- because you
7 think getting more is better. Well, I agree getting
8 more is better, too, but I have a history in this
9 district that Prosecutors always give us more on the eve
10 of trial and not because it's better but because it's
11 better for them to wait until the last minute, and I
12 understand that. I would like to wait until the last
13 minute and sandbag them if I had the ability to do that
14 as well, but it's not fair. The order was set. There
15 was no basis and to slip it in the back door through a
16 status conference report and then put the burden on the
17 Defendants to enforce a prior order is unfair.

18 THE COURT: All right. I'm -- I'm curious. I
19 understand a replacement expert but a drug expert?

20 MS. EL-AMAMY: Correct. Well, this isn't --
21 this isn't a replacement expert.

22 THE COURT: Right. That's what troubles me.

23 MS. EL-AMAMY: Right. What happened was the
24 way this case was -- the Defendants were interested in
25 knowing what the gang expert was going to be so that

1 they could challenge whatever opinions he or she may
2 offer. The Government had no idea a year in advance of
3 trial whether or not it was going to call a gang expert.
4 However, setting the expert notice deadline was set so
5 far that that could be litigated. The Government sent
6 out an expert notice at the deadline because it was
7 forced to make a decision at that time.

8 THE COURT: Uh-huh.

9 MS. EL-AMAMY: It realized because it
10 investigated it more after the deadline had passed, but
11 because the deadline was so early that it really wasn't
12 going to be helpful to the case, that everybody wasted a
13 bunch of time designating an expert that it wasn't going
14 to call and then people investigating it and then not
15 calling the expert.

16 The narcotics expert is just a basic narcotics
17 expert that is called in any type of drug non-complex
18 trial.

19 THE COURT: Uh-huh.

20 MS. EL-AMAMY: It doesn't replace anybody, and
21 it is -- and it is a late disclosure if that is
22 troubling to the Court.

23 THE COURT: Well, and that's what's troubling
24 to Mr. Cephas.

25 MS. EL-AMAMY: Right.

1 THE COURT: And in this particular case --
2 well, I would imagine everyone knew that a drug expert
3 was going to be called, but I guess Mr. Cephas's point
4 is he didn't know what this expert's going to testify to
5 and I don't know the nature of his expertise. I don't
6 know if he's a chemist or not.

7 MS. EL-AMAMY: He's -- he's.

8 THE COURT: Is he going to talk about street
9 sales and that sort of thing?

10 MS. EL-AMAMY: He's not, Your Honor. Mr. Dore,
11 actually, drafted the expert notice, which was very
12 lengthy.

13 MR. DORE: May I address that briefly,
14 Your Honor?

15 THE COURT: Yes.

16 MR. DORE: Your Honor, I can give the Court a
17 copy.

18 THE COURT: Please. If we're not going to
19 follow the rules, let's not really follow them.

20 (Brief interruption.)

21 THE COURT: Okay.

22 MR. DORE: Your Honor, that expert notice you
23 have was provided by the Government to Defense Counsel
24 last night. It was two experts, one of which is DEA
25 Special Agent (Phonetic) Steve Harris, and the other,

1 which is a Spanish linguist specialist, (Phonetic)
2 Mr. Jesus Dimas. The form of the notice was modeled off
3 of a notice provided to Defense Counsel in a separate
4 case, which was upheld by Judge Feess in an order in a
5 case, United States vs. Albero Vargas, CR 11-50. I have
6 copies of that case if Your Honor -- that order, rather,
7 if Your Honor would be interested in seeing it. In that
8 order -- may I approach, Your Honor?

9 THE COURT: No, I don't need that. I don't
10 need that. I've looked at what you've submitted. I've
11 never seen this format before, but I was looking at the
12 content, and I'll find out in a moment why Mr. Cephas --
13 in fact, let's find out now.

14 What is your complaint with respect to this
15 when he gives you the categories that this expert
16 intends to testify regarding the --

17 MR. CEPHAS: Your Honor, my complaint is
18 Rule 16 doesn't require the Government disclosure to
19 show categories and topics. It requires the Government
20 disclosure to identify opinions. And there are no
21 opinions in here. For example, it claims that he's
22 going to take about the use of code words. Well, I can
23 also cite to several judges in this district who have
24 issued orders saying that the agent has to identify the
25 code words and his opinion as to what those code words

1 are. And if the expert is going to get on the stand and
2 say this is what that word means, that's an opinion.

3 THE COURT: Uh-huh.

4 MR. CEPHAS: And I need that opinion. I might
5 agree with it; I might disagree with it.

6 THE COURT: Okay.

7 MR. CEPHAS: I might need an expert -- a
8 rebuttal expert to say he's dead wrong, and -- and we
9 don't get that.

10 THE COURT: Okay. No. No, that's fine.

11 MR. CEPHAS: Well --

12 THE COURT: Anything else?

13 MR. CEPHAS: Well, throughout the entire
14 designation, that's all we get is topics. These are the
15 topics that he's going to testify to, and I agree --

16 THE COURT: Okay. Here's what I want you to
17 do. Not that this is a noticed motion that we're
18 dealing with, but what I would like you to do and since
19 everyone's here maybe this would be productive. I would
20 like you to, without a lot of hyperbole and chest
21 thumping, just please send a short and concise request
22 to Mr. Dore and tell him just what you just said now
23 with respect to the opinions that you would like.

24 And then, Mr. Dore, I would then like you to
25 respond and tell him that that's what -- I don't know.

1 Mechalina, what it really means is half a pound of meth.
2 All right. Just can you do that? Do you understand
3 what I'm saying?

4 MR. DORE: I understand what you're saying.
5 The only question I have is in regards to time. We,
6 certainly, have different Defendants who are in or going
7 to be out of the case. At this point, the Government is
8 marshalling its resources to determine exactly what
9 exhibits would be used, what transcripts would be used,
10 and for us to specify exactly -- exact interpretations
11 as to exact terms, in effect, is a determination of what
12 exhibits would be used at trial.

13 THE COURT: True.

14 MR. DORE: And so rather than simply having an
15 over-inclusive list would be construed as a dump on
16 Defense Counsel because that, in fact, was not
17 inherently used at trial, the Government would need time
18 to determine that level of specificity if it was
19 required by the Court. Now, certainly, the Government
20 doesn't oppose providing that to Defense Counsel to the
21 extent the Court thinks it's necessary and warranted,
22 but to do it in the immediate term, at this point, would
23 simply just not be that practical.

24 THE COURT: I don't -- I don't think Mr. Cephas
25 is asking for it right now. He just needs it in advance

1 of trial.

2 Now, Mr. Cephas, do you need this in order to
3 make a determination as to whether or not you're going
4 to hire your own expert to say that, no, that is not
5 what this word means in that context?

6 MR. CEPHAS: Correct.

7 THE COURT: Why don't you go ahead and hire
8 your expert.

9 MR. CEPHAS: Well, Your Honor, I will seek CJA
10 authorization to do it.

11 THE COURT: Okay.

12 MR. CEPHAS: But also I need to know what their
13 opinions are so that I may challenge some of the
14 designation as being non-expert testimony.

15 THE COURT: You're there. All right. We're
16 talking about timing now. That's what I'm talking
17 about, is get your expert on board, and my question to
18 you is how far in advance of trial do you think you need
19 this information to give to your expert?

20 MR. CEPHAS: Well --

21 THE COURT: Actually, I know the answer to
22 that. You sit down at Starbucks with your expert and
23 give him a list, and he says yes, yes, yes, no, no, no;
24 right? I mean, if he's an expert, if he knows what
25 these words mean, he can tell you immediately, can't he?

1 MR. CEPHAS: Yes.

2 THE COURT: Shouldn't he?

3 MR. CEPHAS: Yes. I -- I expect he could.

4 THE COURT: All right. So give me a date.

5 MR. CEPHAS: Excuse me?

6 THE COURT: Give me a date by which you would
7 like to have this information from the Government.

8 MR. CEPHAS: September 24th.

9 THE COURT: The trial's November 6th?

10 MR. CEPHAS: Correct, your Honor. Okay. I
11 gave you a shot at it. Now I'll take my own shot.

12 Give me a date in mid to late October. Any
13 date. Okay. 17th of October.

14 MR. CEPHAS: Okay.

15 THE COURT: Mr. Dore, 17th of October.

16 MR. DORE: Yes, Your Honor.

17 MR. CEPHAS: The problem with that, Your Honor.
18 It doesn't provide adequate notice to bring a noticed
19 motion to challenge the expert information, and that --
20 that was the point I was trying to make, that I need to
21 file a noticed motion challenging information in the
22 expert designation, and now I'm going to have to do it
23 by ex parte, which is not -- is not appropriate for
24 that.

25 THE COURT: Look what you've done today.

1 MR. CEPHAS: Well, what I've done today --

2 THE COURT: What you've done today is stand up
3 and make an oral motion.

4 MR. CEPHAS: I've made an oral motion --

5 THE COURT: Okay. You've gotten what you're
6 going to get, Mr. Cephas.

7 MR. CEPHAS: Thank you, Your Honor.

8 THE COURT: All right. Anybody have anything?

9 MR. EISNER: Yes, Your Honor. I just wanted to
10 bring up one of Mr. Cephas's comments regarding that
11 gang expert, and I realize Your Honor discussed the
12 admission of that gang expert. We were talking about
13 foundation.

14 THE COURT: Wait a minute.

15 MR. EISNER: I'm sorry. The drug expert, but I
16 do want to call Your Honor's attention to the fact that
17 what -- what brought us here is Mr. Cephas's motion to
18 preclude the Government from bringing in witnesses late,
19 and that, Your Honor, was it stems from Judge Yuen's
20 order of October 13th, and in in her order, she says
21 that by January 23rd, 2012; and, again, last night on
22 the 10th of November is when we got this narcotics
23 expert, but Judge Yuen's order back in October of '11
24 says that by January 23rd, the Government shall disclose
25 all experts. That wasn't the first cut-off date,

1 Your Honor. Previous to that -- and that date was only
2 given on condition of the Defendants' speedy trial
3 waiver. We continued the case about eight months in
4 order to have those dates to be placed, but the initial
5 date for expert witness disclosure was October 24th of
6 2011, and that was in an earlier motion to continue the
7 trial. I don't want to belabor the point, Your Honor.

8 THE COURT: But you are. What -- what are you
9 asking?

10 MR. EISNER: Well, I'm -- I'm just reiterating
11 my objection to the Government being allowed to disclose
12 at this late date additional experts. We have two new
13 experts as of the last two weeks, one is a language
14 expert and one is a narcotics expert.

15 THE COURT: Okay.

16 MR. EISNER: And -- and I just wanted to
17 reiterate my objection to that and just call
18 Your Honor's attention to the previous due dates that
19 had come and gone prior to what's being heard today.
20 Thank you.

21 THE COURT: All right. Thank you.

22 MR. DORE: Your Honor, may I just note one
23 thing for the record? There is Ninth Circuit authority
24 for expert disclosures happening within twelve days of
25 trial, and so we believe two months is not an

1 exceedingly late date, particularly, given that
2 Agent Steve Harris was noticed in that Judge Feess case
3 I referenced earlier in which two Defense Counsel in
4 this case were, actually, Defense Counsel. So they had
5 an opportunity to -- at least some of the Defense
6 Counsel had an opportunity to hear him in that case, but
7 just as a more general matter, obviously, we know that
8 two months is not an exceedingly long period. That
9 said, the operative -- the date in Judge Yuen's order
10 did say February 29th, 2012, to disclose expert
11 testimony or expert witnesses. We believe that that is
12 too early a date given that it's nine months ahead, and
13 we don't know the shape of the case then when it had
14 over 49 Defendants versus now when it's down to ten.
15 And, thus, at this point, it might expedite things and
16 save time if we resolve with the Court whether or not
17 there's another date that would be appropriate, whether
18 the date is today or some date in the past, whereby, the
19 Government can disclose the expert witnesses including
20 the two last night.

21 THE COURT: I don't like -- I really don't like
22 this -- this practice or policy of making disclosures
23 eight, nine months in advance, except in this case with
24 respect to gangs and drugs. I think everyone in the
25 room anticipated that there would be a gang expert and a

1 drug expert. So neither of those, I think, would come
2 as a surprise to anyone. However, Mr. Cephas raises a
3 point. Even though you have provided -- even at this
4 date you have provided categories that this expert is
5 testifying regarding there are no opinions. So with
6 respect to interpretation of some of the words that were
7 picked up on these telephone conversations, let's get a
8 glossary together and provide it -- is it
9 October 17th? -- to Defense Counsel.

10 Now, with respect to any additional experts,
11 other than having to replace an expert who is now
12 unavailable, does the Government seriously anticipate
13 identifying any additional experts?

14 MS. EL-AMAMY: Not to its knowledge.

15 THE COURT: Okay. Mr. Dore, you were going to
16 exercise caution?

17 MR. DORE: Yes, Your Honor. If anyone came to
18 mind immediately, we would have done it, but the fact of
19 the matter is now that we are basically on the eve of
20 trial and two-month period where we basically know where
21 we're going, the Government will be putting its exhibits
22 together, and it's finalizing its witness list. We do
23 not expect there to be any additional experts, but it is
24 conceivable in finalizing that list and determine
25 exactly what terms, for example, Agent Harris can

1 interpret that there would be another one that would be
2 necessary. We, certainly, don't expect to do it. We
3 have no desire to drop any witnesses on the Defense at
4 the last minute, who, obviously, themselves do not
5 apparently have a deadline to disclose their own experts
6 in response. To this is not meant to be an exercise for
7 the Court by any means. It was simply to set out so
8 that we're all on the same page if something does come
9 up and the Government does provide notice of that, but
10 we are not looking to do that or planning to.

11 THE COURT: Sure. All right. The 28th of this
12 month, but extraordinary good cause would have to be
13 shown. All right. That's to add any additional
14 experts. It's not going to replace. If you replace an
15 already designated expert, that's a different thing and
16 then provide Mr. -- not just Mr. Cephas but all Defense
17 Counsel by August 17th with a list of the opinions that
18 your gang expert is going to offer.

19 All right. We are adjourned.

20 MR. BAKMAN: Your Honor, I had one other
21 matter. Your Honor, briefly. Since you've indicated
22 that there was a severance and we have two groupings, I
23 would be in the second grouping with Mr. Vega, do we
24 have any idea as to when to expect the trial date?

25 THE COURT: No.

1 MR. BAKMAN: All right. So I can rely upon the
2 fact that I would not be present November 5th for trial
3 in this matter; is that correct, Your Honor?

4 THE COURT: Maybe we ought to use the 17th as
5 also a final pretrial conference, an all-hands final
6 pretrial conference, and at that time, we need to
7 discuss this, really finalize it so that everyone knows,
8 and then we'll also set a date for the second trial.

9 MR. BAKMAN: All right. And the reason I ask,
10 Your Honor, clearly, I start trial with Judge Real in
11 about a week and a half. I would not be able to prepare
12 this by November 5th. So I really want to make sure I
13 don't have to go to trial November 5th.

14 THE COURT: Well, remember. The November date
15 was set by Defense Counsel; remember?

16 MR. BAKMAN: I -- I understand, and if I have
17 to go on the 5th, I'll do -- you know as well as I do
18 what I need to do to be ready on November 5th, but I
19 would prefer to know now that I don't have to go there
20 at this point in time in terms of trial prep, final
21 trial prep.

22 THE COURT: Right now, right this minute, I
23 intend to adopt the only written proposal I have with
24 respect to the grouping; and, coincidentally, I get that
25 proposal from, perhaps, the one who would know best, the

1 Government who is the one who is going to be putting on
2 this evidence.

3 Once, again, your client?

4 MR. BAKMAN: Steven Vega, Your Honor.

5 THE COURT: Vega. As it stands right now, Vega
6 would be in the second group; yes, sir.

7 MR. PEREZ: Your Honor, I'm on the first group
8 with Salvador Martinez.

9 THE COURT: All right.

10 MR. PEREZ: I also want to add that that group
11 should be broken down into two groups, and the reason
12 is, Your Honor, as far as my client is concerned,
13 No. 45 --

14 THE COURT: Uh-huh.

15 MR. PEREZ: -- Salvador Martinez, he is not
16 charged in the RICO conspiracy. He is not charged in
17 the RICO crime.

18 THE COURT: Uh-huh.

19 MR. PEREZ: He's merely in the charge drug
20 conspiracy.

21 THE COURT: Uh-huh. Listen. Everyone of you,
22 as I suppose, is in a different position and everyone
23 can stand and voice an opinion. That is why a month ago
24 I asked you to get together. Okay. It would have been
25 nice if I could have ad just a postcard-sized submission

1 from each of you saying this is why this grouping makes
2 sense, okay, in terms of evidence. I do not know the
3 specific acts that each of your respective clients are
4 going to have to defend against. In terms of someone in
5 the room who is capable of, actually, making an
6 intelligent decision regarding grouping, I am the last
7 person on the list. I needed input from all of you. I
8 got input from Ms. El-Amamy.

9 MR. PEREZ: Yes, that's the only reason I spoke
10 up because in her input she omitted to mention that my
11 client was not charged in the RICO conspiracy or the
12 RICO crimes, Your Honor.

13 THE COURT: That would have been good to read.
14 People are handing me things this morning. I got
15 submissions this morning. Okay. It's nice to get these
16 things in writing.

17 Okay. Anyway, we are --

18 MR. CEPHAS: I have some housekeeping issues.
19 With respect to the Declaration or the motion to
20 suppress, I submitted an electronic signature. The
21 Government didn't object to it. I have -- I have signed
22 versions if the Court wants --

23 THE COURT: No, I took it at your word. I
24 didn't think you were --

25 MR. CEPHAS: Well, I just wanted to make sure

1 because the Court had said something at the last hearing
2 that made me unclear as to whether you would permit the
3 electronic signature.

4 THE COURT: No, Mr. Cephas, we wouldn't have
5 entertained your argument if it hadn't been established
6 that your client had standing.

7 MR. CEPHAS: Thank you.

8 THE COURT: All right. We're done. We are
9 done.

10 (Proceedings concluded at 11:31 A.M.)

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C E R T I F I C A T E

I hereby certify that, pursuant to Title 28,
Section 753, United States Code, the foregoing is a true
and correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that
the transcript page format is in conformance with the
regulations of the Judicial Conference of the
United States.

Certified on June 6, 2013.

/s/ Katherine M. Stride
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